APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

1932

Jan. 4, 7.

MONTGOMERY

v.

SIKDAR IRON WORKS, LTD.*

Company—Winding-up—Contributory—Liability to pay call—Order for enforcement of call—Payment before formal order for call—Liability to pay over again—Indian Companies Act (VII of 1913), ss. 156, 159 (i), 190.

The liability of a contributory to pay call becomes a debt when an order for winding-up is made, but the debt is payable when an order to enforce the call is made.

If an official liquidator demands payment of call moneys before a formal order for enforcement of calls is made and the contributory pays to the liquidator, in his official capacity, it is not reasonable or right to order such contributory to pay the money over again, because he did not take the precaution to see that the Court had made an order enforcing a call and he did not notice that, under the usual practice of the Court, payment would be ordered to be made into the Imperial Bank of India.

APPEAL by the contributory.

The facts of the case appear fully from the judgment.

Page (with him *Ormond*) for the appellant. The money was paid for a contingent liability. Although the liquidator had no power to make a call, he had given discharge within his authority. The company's remedy, if any, is against the liquidator or his sureties.

Khaitan for the respondent. The order of 25th November is conclusive against the appellant. See section 190 of the Act.

The position is similar to that of the execution of a decree already satisfied. The debtor must first pay, if the debt has not been properly discharged, and then proceed against the decree-holder for fraud.

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[RANKIN C. J. There is no analogy with that. That is under a specific rule of the Civil Procedure Code.]

The payment was made to Viney & Thurston, who are not the liquidators. Any loan to the liquidator cannot be set off against liability to pay call.

Page, in reply. It was payment of a debt which had accrued due and not a voluntary payment. See section 59 of the Act. Section 190 makes it money due but the Court need not enforce it.

Cur. adv. vult.

RANKIN C. J. This is an appeal by one Geoffrey Cornwallis Montgomery against an order of my learned brother, Mr. Justice Costello, made in the winding up, under an order of the Court, of the Sikdar Iron Works, Ltd. The company was ordered to be wound up by an order of this Court made in 1925, and, in August of that year, one Mr. L. S. Bavin was appointed official liquidator, by the Court. On the 27th of August, by an order made by consent of certain persons, Mr. Bavin was given all the powers conferred by section 179 of the Indian Companies Act and was given liberty to carry on the business of the company for a limited time and to arrange for finance upon such terms as he should think fit. This order of the 27th August was not unfortunately brought to the notice of the learned Judge who heard the present application on the Original Side. In June of 1927, the usual steps were taken by Mr. Bavin, as the official liquidator, for having the list of contributories settled by the Court on the 13th of that month. Notices appear to have been issued to the contributories and, in particular, to Mr. Montgomery. For some reason, which is not apparent, the list of contributories was not settled by the learned Judge until the 18th April, 1929, when that list was formally signed. In the meantime, it appears that Mr. Bavin, as official liquidator, wrote

to the appellant Mr. Montgomery, asking for payment of a sum Rs. 2,250, being the amount due from him in the winding up as "call" upon 900 shares of Rs. 10 each held by Mr. Montgomery—each share being paid up to the extent of Rs. 7-8 and Rs. 2-8 being payable, therefore, in respect of each share. The applicant immediately sent his cheque to Mr. Bavin, as official liquidator, for the amount demanded. The cheque has been produced. It is in the following form: "Pay "to Messrs. Viney & Thurston, Liquidators, Sikdar "Iron Works, Ltd., Rs. 2,250 only." It does not appear as we have not got the letter from Mr. Bavin to Mr. Montgomery how that letter was sent; but Viney & Thurston was either the name of the firm of which Mr. Bavin was a member or the name under which Mr. Bavin practised as accountant. It will be seen that some little time after this was sent, the list of contributories was formally settled and later on in the year, namely, on the 25th November, 1929, a formal order was made by the Court under section 187 of the Indian Companies Act making a call for the full amount payable on each share from all the contributories. That order was in the form prescribed by the Rules of this Court directing each contributory to make the payment due from him into the Imperial Bank by March, 1930. The order having been made at the instance of Mr. Bavin, it does not appear that, so far as Mr. Montgomery was concerned, Mr. Bavin took any steps under that order. Now, when March, 1930, came, Mr. Bavin was in trouble and at the present moment he is undergoing a sentence in respect of some offence not connected with the present company. When he was about to be removed, he wrote to his attorneys a letter, in which he asked them to inform the gentleman who would be appointed in his place that from time to time he had received amounts payable for calls on shares during the course of the liquidation. That letter has been produced in evidence and one of the persons mentioned in it, as having paid the call, was Mr. Montgomery, the

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appellant, who is stated, quite truly, to have paid Rs. 2,250 on that account. Mr. Bavin was immediately afterwards succeeded by Mr. Purohit, who completed his security and obtained an order extending the time for payment of the calls up to August, 1930. In February, 1931, he took out a summons, *inter alia*, against Mr. Montgomery to enforce the call under the order of the 25th of November, 1929. Mr. Montgomery's answer to that was that he had already paid to the then official liquidator, Mr. Bavin, and that he could not be called upon to pay twice.

The learned Judge in his judgment laid great stress upon the fact, as he understood it, that no order had been made giving Mr. Bavin any of the powers under section 179 of the Indian Companies Act and so none of the powers therein mentioned could be exercised by Mr. Bavin without obtaining the sanction of the Court. This is really the main ground of the judgment. As it now appears, that proper materials were not laid before the learned Judge on that point and that an order had been made giving these powers to Mr. Bavin, the reasoning of the learned Judge's judgment is to a great extent removed. There is one passage, however, in his judgment to which I would like to refer. The learned Judge observes :

> As I have already said, it is no doubt a very great hardship upon Mr. Montgomery that he should have to suffer owing to the default of Mr. Bavin. The answer to that view of the matter is that persons when they are making payments to a company, in liquidation, in respect of an obligation due from them to the company, in liquidation, * * * should satisfy themselves that the person to whom the payment is made is clothed with the necessary authority to receive the payment and has power to give a proper discharge from that obligation.

Now, it appears to me that this is a matter which requires somewhat careful consideration before the principle stated by the learned Judge is applied to the facts of this case. The position is that, under the Companies Act and by virtue of section 156, upon the happening of a winding up, a new statutory liability is imposed upon certain persons who are called contributories. Prior to that, no doubt there was a

liability to pay the calls when calls should be made by the management of the company; but where such calls have been made, if any money is due and unpaid upon the total amount of the shares, the liability attaches upon the winding up under section 156 of the Act. This matter was very fully considered with reference to a question of set-off by Sir George Jessel in the well-known case of *Whitehouse & Co.* (1). There can be no doubt, therefore, that it is no answer at all to a claim, in a winding up, under section 156 to say that a transaction had been had by the company before the winding up or that there had been an arrangement made by the directors which could be set up as excluding the statutory liability which attaches upon the winding up. The present case is clearly not one of that character. The present case is one in which it is said that, after the winding up, the money was demanded under the section by the person who was the official liquidator at that time, that it was paid to him as such and that he received it. Now, it is noticeable and it is not in any way denied that quite a number of persons appear to have been treated in the same way and to have acted in the same way as Mr. Montgomery. A demand was made by Mr. Bavin, as official liquidator, at a time when no formal order of the Court was in existence. It is quite intelligible that an ordinary business man should not have noticed anything wrong. In a voluntary winding up, as distinct from a compulsory winding up, it is the liquidator who, without any order from the Court, may make a call on his own responsibility and he would be quite in order in such a case to make a call and receive the payment. One cannot expect a business man always to have in mind whether the company has been wound up voluntarily or compulsorily. In India, as distinct from England, there is at present no provision by which the liquidator in a compulsory winding up can make a call without coming to Court; but there is no doubt that, whether in a voluntary winding up or in

(1) (1878) 9 Ch. D. 595.

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a compulsory winding up, the call is really a contribution to the assets of the company for the purpose of the winding up which contribution is enforceable by the official liquidator for the purpose of putting funds into his control for the administration of the company's affairs. A number of people, for one reason or another, had been induced by the demand made by the official liquidator and then immediately afterwards steps were taken to put the demand in order and the order of the 25th of November, 1929, made the liability for the first time become payable. But I would here point out that, by the express terms of the Indian Companies Act, section 159, sub-clause (*i*), the liability does not arise for the first time on the making of the order by the Court. The section says "the liability of a contributory shall create a debt "accruing due from him at the time when his liability "commenced but payable at the times when calls are "made for enforcing the liability." So that, at the time when this money was paid it was paid in respect of the existing debt which was *debitum in presenti* but *solvendum in futuro*. It may further be noticed that, although as a matter of practice when this Court makes an order to enforce calls it directs the contributories to pay to the Imperial Bank, that is purely a precautionary measure and, if it becomes necessary, in order to facilitate enforcement of the payment, this Court by its rules, has power to make an order on the contributories to pay to the official liquidator direct. As a matter of fact, the summons taken out by Mr. Purohit asked for an order that he might be paid the sum direct.

In these circumstances, the question is whether it is enough to say that this contributory, who sent his cheque to the official liquidator, upon the demand of the official liquidator, should have known better, and because he did not take the precaution to see that the Court had made an order enforcing the call and did not notice that under the usual practice of the Court payment would be ordered to be made into the Imperial

Bank, it is reasonable and right that he should be ordered to pay the money twice. It seems to me that, as regards the order of 25th November, 1929, it was an order obtained by Mr. Bavin, who had no intention whatever of obtaining the money twice. Mr. Montgomery had no reason to think that, because a formal order constituting his liability was being made, Mr. Bavin would attempt to obtain the money twice. It was Mr. Bavin's duty, as an officer of the Court, when he applied for and obtained that order, to lay before the Court all the facts as regards the receipt of the money in anticipation of the liability maturing and, while it is quite true that there is a section in the statute which says that the order is to be conclusive evidence that money was due, all that one can say as to that is that the money became due in the sense of becoming payable when the order of the 25th November was made and, if in the meantime the official liquidator had obtained the money, then it was his duty to apply it in discharge of the liability which became operative for the first time when the order of the Court was made. I do not think that section 190 of the Indian Companies Act has any importance whatever in the circumstances of this case. Mr. Purohit merely stands in the shoes of Mr. Bavin, that is to say, as regards his official capacity and we have to ask ourselves, first, whether there is any real evidence that the assets of the company have been deprived of the money which Mr. Montgomery paid or whether there is any evidence that the company in one way or another has got the benefit of that payment. Upon that point, the evidence is practically non-existent. The only evidence in the case is a very short affidavit of Mr. Purohit who says nothing about this matter at all. He merely takes his stand on the fact of the order of the 25th November and the fact that no payment has been made since. Mr. Montgomery naturally knows nothing about the matter. The learned Judge made an order directing that Mr. Bavin should be required

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to give an account, in particular, as to what he had done with the money. But that only resulted in a letter written from prison by Mr. Bavin saying that he had filed all his papers and had accounted for all his receipts and what he had done with the money. In view of Mr. Bavin's action in collecting the money prior to his having any right to collect it and putting it in the way that he put it into another bank, instead of putting it into the Imperial Bank, it seems very doubtful whether the company's creditors have really got any benefit of the money which Mr. Bavin had so collected. There is, however, no material before the Court, which would enable us to say that the official liquidator has proved that the money was misapplied, or which would enable the appellant Mr. Montgomery to say that he has shown that the company did get the benefit of the payment in any way. We have to deal with the question in that state of the evidence. I do not consider that it is sufficient to say that Mr. Montgomery should have taken care to see that there was an order enforcing the call and should have noticed that in that event he would be directed to pay to the account of the official liquidator into the Imperial Bank. The official liquidator is a person who was appointed by the Court. He was administering this company as the hand of the Court for the purpose. There was an existing debt though the money had not yet become payable. Mr. Montgomery had received notice that he would be put on the list of contributories. This Court, by its officer, demanded the money from him. He, in company with other very respectable people, answered the calls made by the official liquidator in that way. He was paying the money direct to the person who had the administration of the company's affairs. In these circumstances, it does not seem to me that it would be right for this Court to enforce against him a liability, which he has already, at the request of this Court's Officer, discharged by payment made to him in his official name. I quite agree that

there are hard cases where nevertheless no attention can be paid to the hardship. But I am not of opinion that this is such a case. In my judgment, it would be wrong for this Court to make an order that Mr. Montgomery should pay this amount twice over.

In this view, I am of opinion that the appeal should be allowed, the order of the learned Judge as against Mr. Montgomery should be discharged and the application against him should be dismissed with costs before the learned Judge and in this Court.

GHOSE J. I agree.

Appeal allowed.

Attorneys for appellant: *Sanderson & Co.*

Attorneys for respondent: *Khaitan & Co.*

S. M.